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## MEMORANDUM

To: The City of Blue Ridge—Mayor and City Council

From: Ken E. Jarrard, Esq.; Megan N. Martin, Esq.; and Jeffrey J. Costolnick, Esq.

Date: June 14, 2016

Subject: City of Blue Ridge Investigation: Phase Two Findings

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On November 10, 2015, the Blue Ridge City Council appointed Jarrard & Davis, LLP (Jarrard & Davis) to undertake a review of the City of Blue Ridge's (the "City's") policies and practices with respect to governmental operations, to identify areas where the City is not or may not be complying with pertinent local or state law, to identify any elected officials that are acting in a manner inconsistent with pertinent local or state law, and to otherwise make recommendations regarding the improvement of City operations. Jarrard & Davis, LLP proposed a two-phased approach to performing this review.

The first phase of the investigation ("Phase I") consisted of a series of interviews with senior staff and officials for purposes of issue spotting. On February 2, 2016, Jarrard & Davis, LLP, through attorney Ken Jarrard, presented the findings from Phase I to the City, along with a "Master List" of recommendations for further scrutiny during the proposed second phase of the investigation ("Phase II"). See, Exhibit A, pg. 7. The "Master List" identified the following issues as warranting investigation:

1. The financial accountability of a City Department regarding reported, irregular liquidation of City assets and accounting of cash transactions;
2. The ongoing questions regarding the Mayor's legal place of residence – to include permitting – in order to definitively conclude that matter; and
3. A review of whether City officials are (or have in the recent past) utilized City resources for personal gain or the betterment of their friends and families. *Id.*

therefore it is appropriate that a heightened degree of accountability and transparency accompany this transaction.

**II. Report that the Mayor does not maintain her legal place of residence within the City limits.**

The second issue on the "Master List" considered worthy of further investigation was "[t]he ongoing questions regarding the Mayor's legal place of residence – to include permitting . . .", which relates to allegations that the current City Mayor, Mayor Donna Whitener ("Mayor Whitener"), does not reside within the City limits. Section 2.10(b) of the City Charter provides as follows:

*(b) The mayor and councilmembers shall serve for terms of four years and until their respective successors are elected and qualified. No person shall be eligible to serve as mayor or councilmember unless he shall have been a resident of this city for 12 months immediately preceding the election of mayor or councilmembers; each such person shall continue to reside within the city during said period of service and shall be registered and qualified to vote in municipal elections of this city. No person's name shall be listed as a candidate on the ballot for election for either mayor or councilmember unless such person shall file a written notice with the clerk of said city that he desires his name to be placed on said ballot as a candidate either for mayor or councilmember. No person shall be eligible for the office of mayor or councilmember unless such person shall file above said notice within the time provided for in Chapter 3 of Title 21 of the O.C.G.A., the "Georgia Municipal Election Code."*

City of Blue Ridge Charter of 1989, 1989 Ga. Law 3823 (Section 2.10(b)). Accordingly, this issue is threefold—whether Mayor Whitener: (1) was a resident of the City for 12 months immediately preceding her election; (2) continues to reside within the City during her period of service; and (3) is registered and qualified to vote in the City.

Mayor Whitener has acknowledged that she is aware of these allegations and has provided documentation to this office as part of her efforts at aiding in the investigation. Mayor Whitener was elected to office in 2010. She currently owns property at 266 Orvin Lance Drive (previously numbered as 169 Orvin Lance Connector), which is within the boundaries of the City, and in 2006, constructed a 65,000 square foot (approx.) home furnishing outlet business on that property, with several tenant spaces. Above the aforementioned furnishing business, on the mezzanine level within the same structure, exists a two bedroom 1,650 square foot (approx.) residential apartment.

The City Building Inspector confirmed that the building was built in accordance with the City zoning requirements and, on March 10, 2006, Mayor Whitener was issued a certificate of



occupancy for that structure. See Exhibit J. The general contractor who reportedly constructed this structure has confirmed verbally and in writing that "[i]n the plans for [the 266 Orvin Lance Drive] property with Donna Whitener & Clyde Fortner we discussed and confirmed that an apartment was to be included in the building. We also confirmed that the apartment was to be used as a residence for Donna Whitener." See Exhibit K. On January 30, 2006, a site inspection and building evaluation was performed in connection with that property, which revealed "[t]he small residence located in the mezzanine level appeared to have full interior finishes." See Exhibit L, pg. 2.

According to the Fannin County Board of Elections, Mayor Whitener has been registered to vote in Fannin County since 1992, and registered to vote in the City, under the 266 Orvin Lance Drive address, since at least 2008 (her last voter registration "status change" being shown as March 4, 2008). Therefore, the third question regarding voter registration has clearly been met and the primary focus of the investigation into this matter involved the first and second questions, regarding "residency."

The legal definition of what constitutes "residency" is by its very nature a somewhat amorphous legal concept. For guidance, we turn to the Georgia elections statute, O.C.G.A. § 21-2-217, which sets forth a defined index of "rules for determination of residence" with regard to voter registration and qualification, and provides, in relevant part, as follows:

*(a) In determining the residence of a person desiring to register to vote or to qualify to run for elective office, the following rules shall be followed so far as they are applicable;*

- (1) The residence of any person shall be held to be in that place in which such person's habitation is fixed, without any present intention of removing therefrom;*
- (2) A person shall not be considered to have lost such person's residence who leaves such person's home and goes into another state or county or municipality in this state, for temporary purposes only, with the intention of returning, unless such person shall register to vote or perform other acts indicating a desire to change such person's citizenship and residence;*
- (3) A person shall not be considered to have gained a residence in any county or municipality of this state into which such person has come for temporary purposes only without the intention of making such county or municipality such person's permanent place of abode;*
- (4) If a person removes to another state with the intention of making it such person's residence, such person shall be considered to have lost such person's residence in this state;*

- (4.1) If a person removes to another county or municipality in this state with the intention of making it such person's residence, such person shall be considered to have lost such person's residence in the former county or municipality in this state;
- (5) If a person removes to another state with the intention of remaining there an indefinite time and making such state such person's place of residence, such person shall be considered to have lost such person's residence in this state, notwithstanding that such person may intend to return at some indefinite future period;
- (6) If a person removes to another county or municipality within this state with the intention of remaining there an indefinite time and making such other county or municipality such person's place of residence, such person shall be considered to have lost such person's residence in the former county or municipality, notwithstanding that such person may intend to return at some indefinite future period;
- (7) The residence for voting purposes of a person shall not be required to be the same as the residence for voting purposes of his or her spouse;
- (8) No person shall be deemed to have gained or lost a residence by reason of such person's presence or absence while enrolled as a student at any college, university, or other institution of learning in this state;
- (9) The mere intention to acquire a new residence, without the fact of removal, shall avail nothing; neither shall the fact of removal without the intention;
- (10) No member of the armed forces of the United States shall be deemed to have acquired a residence in this state by reason of being stationed on duty in this state;
- (11) If a person removes to the District of Columbia or other federal territory, another state, or foreign country to engage in government service, such person shall not be considered to have lost such person's residence in this state during the period of such service; and the place where the person resided at the time of such person's removal shall be considered and held to be such person's place of residence;
- (12) If a person is adjudged mentally ill and is committed to an institution for the mentally ill, such person shall not be considered to have gained a residence in the county in which the institution to which such person is committed is located;



(13) *If a person goes into another state and while there exercises the right of a citizen by voting, such person shall be considered to have lost such person's residence in this state;*

(14) *The specific address in the county or municipality in which a person has declared a homestead exemption, if a homestead exemption has been claimed, shall be deemed the person's residence address; and*

(15) *For voter registration purposes, the board of registrars and, for candidacy residency purposes, the Secretary of State, election superintendent, or hearing officer may consider evidence of where the person receives significant mail such as personal bills and any other evidence that indicates where the person resides.*

O.C.G.A. § 21-2-217(a); see also, Cook v. Board of Registrars of Randolph County, 320 Ga. App. 447, 449, 740 S.E.2d 223, 225 (2013) (“[w]herever a form of the word “reside” occurs either in the statutes or in the constitution of Georgia with respect to voting, it should be construed to mean “domicile.”). Accordingly, one’s tacit or explicit *intention* concerning his/her place of domicile is a largely determinative factor in discerning residency. Id. In Cook, the Court of Appeals held that where an individual does not take up an actual residence elsewhere with the “avowed intention” of making a change in domicile, he/she will not be considered as having changed their domicile. Cook, *supra*, 320 Ga. App. at 453.

Mayor Whitener disclosed that she owns several other properties within the State of Georgia, which are not located within the City, and that on occasion she spends time at those properties. However, she maintains that her primary residence is the 266 Orvin Lance Drive address. She declares that she receives her personal mail at that address, and this investigation has revealed no evidence to the contrary. She declares that she has never filed for a homestead exemption regarding any of her properties, and our review of property tax records support that assertion.

Based upon the documentary evidence that we have obtained and reviewed, as well as our interviews with the Mayor, we find nothing to suggest that the Mayor’s residence is any place other than 266 Orvin Lance Drive. Does that mean that we have exhausted every possible means of ruling out that another location could serve as the actual residence? No; however, the ability to prove otherwise would involve an evidentiary undertaking that is beyond the scope of this investigation. The only way we believe it would possible to discount the considerable documentary evidence establishing that 266 Orvin Lance Drive is the Mayor’s residence would be (1) the recruitment of private investigators to literally “stake out” and determine where the Mayor appears to reside in the evenings, and/or (2) interviews with family, friends, and acquaintances (none of whom would have to cooperate with Jarrard & Davis given the absence of the subpoena power) to determine via sworn testimony whether the Mayor actually resides at a location other than 266 Orvin Lance Drive. In the absence of those very invasive investigatory techniques, we believe the findings we have made above constitute the best readily available evidence with respect to this residency issue. We are comfortable with the conclusions yielded



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therefrom and believe for all practical purposes this matter should be put to rest.

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